IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4209 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ISHWARBHAI MARGHABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR YN OZA for Petitioner

M/S MG DOSHIT & CO for Respondent No. 1, 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 25/08/2000

ORAL JUDGEMENT

#. Shri Y.N. Oza, learned Sr. Advocate is appearing for the petitioner. Shri S.N.Shelat, learned Addl. A.G. is appearing for the respondents with Shri

A.D.Oza, learned Government Pleader and Shri M.G.Doshit for M/s. M.G.Doshit & Co.

#. Rule of law is the foundation of a democratic society. The Judiciary is the guardian of the rule of law. Hence the judiciary is not only the third pillar but the central pillar of the democratic State. In a democracy like ours, where there is written constitution which is above all individuals and institutions and where the power of judicial review is vested in the superior courts, the Judiciary has a special and additional duty to perform namely to oversee that all the individuals and institutions including executive and the legislature act within the frame work of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society.

#. It is too late in the day now to stress absolute freedom of an employer to impose any condition which he likes on labour. It is always open to industrial adjudication to consider the conditions of employment of the labour to vary them if it is found necessary unless the employer can justify an extraordinary conditions.

#. The doctrine of the absolute freedom of contract has, thus, to yield the higher claims for social justice and the right to dismiss an employee is also controlled subject to well recognised limits in order to carry out the security of the tenure to the employment.

#. It is important to remember that just as the employer's right to exercise his option in terms of the contract has to be recognised so is the employee's right to expect security of tenure to be taken into account.

#. The justice must be rebutted in confidence and the confidence destroyed when the right minded people go away thinking that the Judge was bias.

#. To dunk an officer into the puddle of doubtful integrity, it is not enough that the doubt fringes on a mere hunch. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain the doubt regarding that possibility. Only then, there is justification to ram an officer with the label 'doubtful integrity'.

#.In the present petition, the petitioner has challenged the order of compulsory retirement passed against the petitioner on various grounds mentioned in the memo of petition. The order of compulsory retirement has been passed by the Deputy Secretary to the Government of Gujarat in its Roads and Buildings Department in the name of the Governor of Gujarat dated 8th August, 1986 while exercising the powers conferred by clause (ia) of sub rule (1) of Rule 161 of the Bombay Civil Service Rules ("BCSRs" for short). The petitioner was ordered to retire from the Government service with effect from the date of this order delivered to him and as per rule 161 of the BCSRs, 3 months' notice pay was paid to the petitioner by demand draft bearing No. OL/AZ-356069 dated 7th August, 1986 of the State Bank of Baroda of Rs.12,432.00. Said order of compulsory retirement of the petitioner has been challenged in this petition under Articles 14 and 16 of the Constitution of India.

#. This petition was admitted by issuing rule thereon on 30.3.1988 and at that time, interim relief was refused by this Court (Coram : A.P.Ravani,J.).

##. Initially, the petitioner had challenged the vires of rule 161(a) (c-i) of the BCSRs. In respect of the said challenge, learned advocate Mr. Oza has, in view of the decisions of this Court as well as of the Supreme Court, has not pressed the petitioner's contention about challenging the vires of Rule 1(a) (c-i) of rule 161 of the BCSRs before addressing the division bench on merits of the matter and, therefore, the matter was ordered to be placed before the learned Single Judge dealing with the service matters by order dated 26.8.1986.

##. In the present petition, the respondents have filed affidavit in reply by one Mr. J.D. Dave, Under Secretary, Roads and Buildings Department on 10th September,1986.As against that, affidavit in rejoinder has been filed by the petitioner on 17th September,1986. Thereafter, the respondents have filed further affidavit in reply by one Mr. V.C.Joshi, Under Secretary to the Government of Gujarat, R. & B. Department on 23rd December, 1998. Thereafter, Chief Secretary to the Government Shri L.N.S. Mukundan has filed affidavit on 27-10-1999 in pursuance to the order passed by this court on 11th October, 1999. Thereafter, again, affidavit in reply has been filed by the respondents by one Mr. Anil

Bhatt, Under Secretary, R. & B. Department on 27th July, 2000 along with certain circulars issued by the Government in respect of pointing out different guidelines for the compulsory retirement of the government employee and also produced on record the order of compulsory retirement dated 8th August, 1986. The respondent has also produced the report of the High Power Committee dated 6.6.1986 which is numbered as REV-1085-43-E2. Chief Secretary to the Government of Gujarat set up committee consisting of the Secretary of the Roads and Buildings Department, Additional Chief Secretary of the Home Department and the Chief Secretary to the Government of Gujarat. Said Committee has recommended in the report that the petitioner should be retired on his attaining the age of 55 years on 21st June, 1986 after giving him three months' notice pay as required under the Rules.

##. The present petition has been decided by this Court (Coram : S.K.Keshote,J.) on 26th November, 1999 and in the said decision, the learned Single Judge of this Court dismissed the present petition and the rule has been discharged by this court. Said decision of this court (Coram:S.K.Keshote,J.) was reported in 2000 Lab. and I.C. 1769. Thereafter, said judgment and order passed by the learned Single Judge on 26th November, 1999 was challenged by the petitioner before the division bench of this court by filing letters patent appeal no. 1737 of 1999 in the present petition being special civil application no. 4209 of 1986. The division bench of this court (Coram:B.C.Patel and D.H.Vaghela,JJ.) by judgment and order dated 28th January, 2000 allowed the said appeal and directed the petitioner to produce on record annexure "A" which is filed on record of the civil application and the order passed by the learned Single Judge in the present petition dated 26th November, 1999 has been quashed and set aside and it was directed to the registry of this court to place this petition on board at the earliest for final hearing.

##. Thereafter, this petition was heard by this court finally on 28th July, 2000 and the judgment was reserved by this court.

##. In this petition, amendment was sought for which was allowed by this court and the same was carried out by the petitioner on 22nd December, 1986 as per the order passed by this court. By virtue of the said amendment, paragraph 1/1 to 1/5 have been added in the present

petition.

##. Brief facts of the present petition are as under:

The petitioner, at the relevant time, was working as Superintending Engineer in the Super Class-I post in Roads and Buildings Department of the State Government.He was appointed in they ear 1954 and he completed more than 32 years' service in the department. According to the petitioner, his service career is absolutely unblemish and clean and that there was not a single dark spot in his entire career. Initially, he was appointed on the post of overseer which is now equivalent to the post of Assistant Engineer and, thereafter, he was promoted from time to time in due course. He was promoted to the post of Deputy Engineer in December, 1957 and, thereafter, in the year 1971, he was promoted to the post of Executive Engineer and in the year 1983, he was promoted as a Superintending Engineer, the post in which at the relevant time, the petitioner was working. Said promotion was given to the petitioner in routine course as and when right of the petitioner for the promotion had arose. The petitioner has challenged the impugned order of compulsory retirement on the ground that the same is illegal, erroneous and mala fide. It is also challenged that the impugned order of compulsory retirement has been passed without application of mind and the same dehors the provisions of settled principles of law and several judicial pronouncements. It is also contended by the petitioner that the impugned order of compulsory retirement has been passed on extraneous considerations and is solely arbitrary in character and there was no justification or reason for the authorities to retire the petitioner compulsorily. There is also reference to the preliminary inquiry which was held against the petitioner in the year 1968 wherein, ultimately, after full-fledged inquiry, the petitioner was fully exonerated of the charges levelled against him with the finding that the petitioner was not at all at fault and in the year 1984, one chargesheet was issued against the petitioner for remaining negligent in performance of this duties and reply thereto was submitted by the petitioner in February, 1984 and the said matter was pending at the relevant time when the petition was filed by the petitioner. In para 6, the petitioner has made reference of some judicial pronouncement of the apex court. It is contended that the petitioner has been retired compulsorily on the ground of doubtful integrity and has contended that during 32 years' service, the Government has never thought of it and hence the same cannot now be permitted to justify the action on such a ground which is

considered to be an oblique motive on the part of the respondents. According to the petitioner, there was no adverse remark in respect of his doubtful integrity and, therefore, the impugned order of compulsory retirement passed against the petitioner is arbitrary, unjust,improper, bad in law and unconstitutional. It is also submitted that the petitioner has got certificates for good discharge of his duties as Executive Engineer when he was working during the war period in 1971 in Kachchh area. Vires of rule 161 of the BCSRs has been challenged and the averments to that effect were made by the petitioner in para 10 but subsequently, that challenge has not been pressed by the petitioner as stated earlier and, therefore, it is not necessary to examine that question by this court.

##. In amendment carried out by the petitioner, the petitioner has contended that the committee was not constituted and his case was not referred to the said committee and even if the committee has been appointed, then, the constitution of such committee is not as per the Government rules and regulations and circular dated 7th May, 1980. It is contended that the opinion of the committee is formed on extraneous consideration and then recommended for compulsory retirement of the petitioner and according to the petitioner, as per the Government circular of the year 1976, eight to ten years' previous confidential reports are required to be considered by the committee and according to him, no adverse remarks in the last ten years is pertaining to his integrity and this most particular aspect was overlooked by the committee.It is also pointed out by the petitioner that the criteria for promotion from the post of Executive Engineer to the post of Superintending Engineer is the merit cum seniority and the petitioner had proved the merit and efficiency both and, thereafter, he was promoted to the post of Superintending Engineer in the year 1983 and, therefore, it is the contention of the petitioner that the incidents occurred prior to the promotion to the post of Superintending Engineer cannot now be considered by the committee because the petitioner was promoted regularly after considering the merits, efficiency and seniority of the petitioner. According to the petitioner, if the committee has considered the incidents prior to 1983, then, that decision is bad and dehors the principles laid down by the judicial pronouncements. It is also pointed out that at the time of passing the order in question, the departmental inquiry was pending against the petitioner and, therefore, it amounts to punishment. It also amounts to short cut which has been adopted by the respondents.The petitioner has also contended that

rule 161(c)(ii)(1) of the BCSRs provides that;

"Except as otherwise provided in this sub clause, Government servants in the Bombay Services of Engineers, Class I,must retire on reaching the age of 58 years and may be required by Government to retire on reaching the age of 50 years if they have not attained to the rank of Superintending Engineer. "

##. Referring to the above,rules, the contention has been raised by the petitioner that the respondents have no power to pass such an order against the petitioner because the petitioner was working permanently on the post of Superintending Engineer.

##. The respondents have filed the affidavit in reply and it has been pointed out by the respondents that under rule 161(a) of the Bombay Civil Services Rules read with the Government Guidelines issued from time to time regarding compulsory retirement, the committee set to review the cases of the officers of the rank of head of the department on 6.6.1986. After careful consideration, the committee on the basis of the over all record, particularly with regard to couple of inquiries which reflected doubtful integrity of the petitioner that there is negligence in his allowing poor workmanship of structural work of the Narmada Bhavan at Baroda.The respondents have also pointed out that the work of the petitioner was not found upto mark and on different occasions, his explanation was sought or some inquiry was initiated against him for his negligence in the work. In respect of the construction work of the Multistoreyed building namely Narmada Bhuvan at Baroda, preliminary inquiry was initiated and after receiving explanation from the petitioner, chargesheet was issued against the petitioner on 2nd August, 1986 for various irregularities which reflected his doubtful integrity and, therefore, according to the respondents, the performance of the petitioner has been far from that which would not support his claim for being retained in the Government service much less when it is coupled with the doubtful integrity. It is the contention of the respondents that if some person is efficient but his integrity is doubtful, then, it stands on a different footing. It is also mentioned in the reply filed by the respondents that in respect of the departmental inquiry that the petitioner was punished by imposing punishment of stoppage of one annual increment and the petitioner was not exonerated after the inquiry which relate to the negligence of the petitioner and also tampering with the cement register. It is also

pointed out by the respondents that it was thought desirable in the public interest to retire the petitioner and, therefore, the powers under the rules has been rightly exercised by the respondents in the public interest.

##. Against the said reply, rejoinder has been filed by the petitioner and in the rejoinder, the petitioner has pointed out that in entire service career of 32 years, at no point of time, his integrity has been considered to be doubtful. The petitioner has also contended that for an alleged negligence found during the inspection between 3rd and 6th June, 1981 in respect of discharge of his duties at Multi Storeyed Building known as Narmada Bhuvan which was constructed at Baroda, a letter dated 23.2.1984 was addressed to the petitioner by Dy.Secretary, R & B Department asking him to submit explanation with regard to the work being done in improper manner. It has been contended that when the said letter was received by the petitioner, said building was already completed and it was already occupied by different offices. The petitioner has also submitted that the respondents should be asked to explain as to what tempted the respondents to remain silent from the month of June, 1981 till February, 1984 which is about two years and eight months in initiating the proceedings. It is also submitted that inspite of the aforesaid position, the petitioner was promoted from the post of Executive Engineer to the post of Superintending Engineer in February,1983 and ultimately on 2nd August, 1986, the petitioner has received chargesheet in respect of the aforesaid incident of 1981 six days prior to the order of compulsory retirement passed against the petitioner.

##. The respondents have filed further affidavit in reply by one Mr. V.C.Joshi, Under Secretary, Government of Gujarat,Roads and Buildings Department pointing out therein that the committee observed that in the departmental inquiry, the case concluded in the year 1981 relating to some bridge works and one annual increment was stopped without future effect as a punishment. Charges in that case was relating to tampering with cement register and allowing less use of the cement and poor workmanship. The committee has also observed that in another departmental inquiry, the case which was pending relating to construction work of multi storeyed building namely Narmada Bhavan which has suffered severe cracks on all the beams of all the floors. The petitioner had been charged with the allegations that he had allowed poor workmanship of structural work. The committee had considered it as a serious case and had

come to the conclusion that it may safely be presumed that the case related to lack of integrity and that even the case decided in 1981 related to tampering of cement registers which also led to lack integrity. The committee had recommended that the petitioner should be made to retire on his attaining the age of fifty five years on 21.6.1986 after giving him three months' pay as required under the Rules. It has also been contended that the said recommendations of the reviewing committee was considered by the Government at the highest level and it was decided to retire the petitioner from service in public interest. It has been contended that the departmental inquiry relating to the construction of Narmada Bhavan was concluded in 1993 by which time the petitioner was retired and by order dated 2nd March, 1993, punishment of deduction of Rs.100/- per month from the pension of the petitioner for a period of five years was inflicted on the petitioner after consultation with the Gujarat Public Service Commission. It has also been pointed out that the aforesaid guidelines also provide that in the case of a government servant whose integrity is in doubt, it would be appropriate to consider him for premature retirement irrespective of an assessment of his ability or efficiency in work.

##. In the affidavit filed by Shri L.N.S. Mukundan, Chief Secretary to the Government of Gujarat, it has been pointed out that the chargesheet dated 22nd January, 1979 was served to the petitioner in respect of the work relating to approach road leading to the railway bridges on Orsang and Aswin Rivers for not using the cement as per specifications in the Toe Wall and pitching, tampering with cement records and negligence in performing his duty as Deputy Engineer. It has also been pointed out in the said affidavit that the petitioner has, in his defence statement, stated that he has done his work as per the specifications and therefore, the charges levelled against him are not proved. He has also denied all other charges leveled against him. He has also pointed out that on the said defence statement of the petitioner, it was opined by the concerned Superintending Engineer that the defence may be accepted and the petitioner may be exonerated. The deponent of the said affidavit has further contended that, however,, the Government has called for the opinion of the Superintending Engineer, Quality Control who also agreed with the opinion given by the concerned Superintending Engineer but he found that the petitioner was negligent in his overall supervision. It has, thereafter, been contended that in view of the finding given by the Superintending Engineer, Quality Control that only the

charge with regard to negligence in supervision is proved against the petitioner, the department had suggested the penalty of censure and the competent authority in the Government decided that a penalty of withholding of one increment without future effect be imposed.It has been contended that in his report dated 3.9.1979, the Superintending Engineer,Quality Control has opined that it is difficult to make out if less cement was used and if so to what extent once the work is over. He, however, felt that using Tagara instead of measurement box and insufficient curing are lapses. He has opined in his report that these aspects are to be supervised on a day today basis by the staff on the field and not by the Deputy Engineer which the petitioner then was. Therefore, the Superintending Engineer Quality Control had concluded that the petitioner cannot beheld directly responsible for the deterioration in quality and further that as he was the supervising officer he can be held responsible for lack of adequate supervision. It has been also contended that the service record was placed before the review committee at the time when the committee was reviewing as to whether the petitioner should be continued in service at the age of 55 years or not. At that time, this fact was also considered. It has been submitted that another factor of defects in construction made for Narmada Bhuvan was taken into consideration and the review committee thereupon asked the petitioner to retire compulsorily from the service. It has been submitted that the review committee had also taken into consideration the integrity of the petitioner as doubtful and, therefore, he was asked to retire from the service prematurely.

##. Lastly, the respondents have filed affidavit of one Anil Bhatt, Under Secretary, Roads and Buildings Department, Government of Gujarat and it has been pointed out that rule 161(1)(aa)(i)(1) of the Bombay Civil Service Rules provides that an appointing authority shall, if he is of the opinion that it is in the public interest to do so, have the absolute right to retire a Government servant to whom clause (a) applies by giving him three months' pay and allowances if he is in class -I or class II service or post on or after the date on which he attains the age of 50 years. Thus, the rules empowers the appointing authority to retire any class I or Class II Officer on or after the date on which he attains the age of 50 years. With a view to implement the said provision, the Government has framed guidelines and criteria for reviewing the cases of the employees to retain them in service or to retire them on or after attaining the age of 50 years. These guidelines

prescribe two reviews, one at the age of 50 years and another at the age of 55 years. Thus,in public interest, the government can retire a government servant after he attains the age of 50 years and also on 55 years. In this regard,the copies of the Government Resolutions of the General Administration Department dated 25.10.1963, 15.5.1970 and 28.7.1987 have been produced on record along with the said affidavit at Annexure I collectively. As per the provisions of the said Government Resolutions, the case of the petitioner was reviewed at the age of 55 years and it was decided by the Government to retire the petitioner from service in public interest and on the basis of that review, the petitioner was made to retire with effect from8.8.1986 vide order dated 8.8.1986. Copy of the said order has been produced as Annexure II to the said affidavit in reply. It has also been submitted that the provisions of rule 161(c)(ii) of the BCSRs are not applicable in the case of the petitioner. After the formation of the Gujarat State on 1.5.60, the petitioner was allotted to the Government of Gujarat.The provisions contained in Rule 161 (c)(ii) of the Rules applies only to the members of the Bombay Service of Engineers Class I only. As per the provision of Rule 9(10-A) of the Rules, a candidate in Bombay Service of Engineers Class I and II means a persons elected through open competitive examination held by the Bombay Public Service Commission for appointment to a post in that service. The petitioner was initially appointed as overseer on non gazetted post in erstwhile Bombay State and that he was not a candidate selected by Bombay Public Service Commission. In the erstwhile Bombay State the petitioner had served as overseer upto 19.12.1957. Then he was promoted to the post of Deputy Executive Engineer on 20.12.1957. On formation of the State of Gujarat on 1.5.1960, the petitioner was allocated to the Government of Gujarat as Deputy Executive Engineer and from 1.5.1960 onwards i.e. from the formation of the Gujarat State the petitioner was under the service of the Government of Gujarat till his retirement.He had not served under the Bombay State after 1.5.60. In the Government of Gujarat, the petitioner was promoted to the post of Executive Engineer Cl.I on13.10.1971 and later on, he was promoted to the post of Superintending Engineer on 9.2.1983. Thus, at the time of retirement of the petitioner, the petitioner belongs to the Gujarat Engineering Service Cadre and not to the Bombay Service Engineering Cadre and, hence the provisions of rule 161(c)(ii) are not attracted to the case of the petitioner.

##. I have heard Mr. Oza, the learned advocate for the petitioner. I have also heard Mr. S.N.Shelat, learned

Additional Advocate General appearing with Mr. A.D.Oza, learned Government Pleader for the respondents at length. Learned Addl. A.G. Mr. Shelat has produced on record the report of the committee dated 6.6.1986 which reads as under:

"The Committee set up to review the cases of officers of the rank of Heads of Departments and above when they attain the age of 50/55 years, met today to review the case of Shri I.M.. Patel, Superintending Engineer in R & B Department.

The Committee examined the confidential reports of Shri I.M.. Patel and observed that the same are generally good except that in the year 1978 79 where adverse remarks were communicated to him which were subsequently expunged.

The Committee observed that in the departmental inquiry case which is concluded in 1981 relating to some bridge works, one increment for one year without future effect was withheld as punishment. The charges in this case relate to tampering of cement records and allowing less use of cement and poor workmanship. The Committee also observed in the other departmental case which is yet pending, relating to the construction of multi storeyed building Narmada Bhavan at Baroda which has suffered severe cracks on all the beams of all the floors, Shri Patel has been charged with the allegations that he has allowed poor workmanship of structural work. The Committee considered this as a serious case and came to the conclusion that it may be safely presumed that this case relates to lack of integrity. Even the other decided case in 1981 related to tampering of cement registers which also leads to lack of integrity.

In view of the above, the Committee recommends that Shri I.M.. Patel should be made to retire on his attaining the age of 55 years on 21.6.1986 after giving him three months' pay as required under rules."

##. It is the contention of Mr. Oza that the impugned order of compulsory retirement in such circumstances is arbitrary, malafide punitive and it amounts to colourable exercise of powers and non

application of mind by the authority. He has also submitted that the order of compulsory retirement has been passed against the petitioner at the time when, undisputedly, departmental inquiry in respect of the chargesheet dated 2nd August, 1986 was pending against the petitioner. He has submitted that considering the report of the committee wherein the committee has examined the confidential remarks of the petitioner and has observed that the same are generally good except that in the year 1978-79 where adverse remarks were communicated to the petitioner which where subsequently expunged. He has also submitted that the committee has also considered the punishment in respect of the departmental inquiry which was concluded in the year 1981 wherein punishment of stoppage of one annual increment was inflicted upon the petitioner without future effect. He has submitted that the committee has also considered the pending departmental inquiry in respect of construction of multi storeyed building Narmada Bhavan at Baroda. Said case has been considered by the committee as a serious case and that has been relied upon by the committee and on that basis, it was safely presumed by the committee that this case relates to lack of integrity and, therefore, Mr. Oza has submitted that if in respect of allegation of misconduct, if the departmental inquiry was already initiated against the petitioner and which was pending when the decision was taken, then, such an order of compulsory retirement shall amount to punishment. He has submitted that the committee has not considered any other relevant factors before passing the impugned order of compulsory retirement against the petitioner. There is no mention in the report of the committee about the lack of integrity of the petitioner and, therefore, according to Mr. Oza, the impugned order of compulsory retirement is arbitrary and it amounts to victimisation and it is also a cut short method adopted by the respondents and, therefore, the impugned order of compulsory retirement is bad in law and is liable to be quashed and set aside.

##. As against that, learned Government Pleader Mr. A.D.Oza as well as learned Addl.A.G. Mr. S.N. Shelat appearing for the respondents have submitted that the committee has considered pending inquiry in respect of the construction work of Narmada Bhavan and also considered the bridge work and over all assessment of the department work and, thereafter, the committee has come to the conclusion that the petitioner is not entitled to be retained in service and the Government is justified in ordering the petitioner to retire compulsorily after considering all the relevant aspects of the matter. It

has also been submitted that these are the absolute powers under the rules vested in the Government which can be exercised by the Government in a given case when the committee has satisfied itself that in the public interest, an employee who is lacking integrity cannot be retained in service beyond 55 years' age. It has also been submitted that it is the bonafide exercise of powers by the Government and, therefore, the impugned order passed by the Government is quite just, legal and valid.

##. Learned Sr. Advocate Mr. Yatin N. Oza appearing for the petitioner has relied upon certain pronouncements of this court as well as of the apex court, as under:

(1) Decision in special civil application no. 28 of 1990 dated October, 1990.
(2) Decision in special civil application no. 3505 of 1990 dated 30thJanuary,1991.
(3) Decision of the learned Single Judge of this Court in special civil application no. 5643 of 1989 dated 28th April, 2000.
(4) Decision in case of State of Punjab versus Diwan Chunilal reported in AIR 1970 SC 2086
(5) Decision in case of J.M. Mehta versus State of Gujarat reported in 1991 (1) GLH 361.
(6) Decision in case of State of Gujarat and another versus Suryakant C. Shah reported in 1999 (1) GLH 193.
(7) Decision in case of Narendra Kumar V.Parikh versus State of Gujarat reported in 1999 (1) GLH 816.

##. As against that, learned Addl. A.G. Mr. Shelat has relied upon the decision of the apex court in case of State of Orissa and others versus Ramchandra Das reported in AIR 1996 SC 2436.

##. Learned advocate Mr.Y.N.Oza for the petitioner has contended that the order of compulsory retirement as envisaged under rule 161 (i)(aa) of the Rules can be passed only if the integrity of an employee is found to be doubtful and in that case only, in public interenst, order of compulsory retirement can be passed against such an employee. So far as the case of the petitioner is concerned, his service career of 32 years is dotless. Only on one occasion in his entire service, adverse remarks communicated to the petitioner were subsequently expunged on representation being made by the petitioner. He has submitted that the adverse remarks made in the service record of the petitioner cannot be made a basis

for an order of compulsory retirement.He has also contended that on having look at the impugned order and report of the committee, it only contains that the petitioner is compulsorily retired in the public interest but it does not contain how public interest suffered if such order of compulsory retirement is not passed. The Committee ought to have recorded not only subjective satisfaction but bona fides based on relevant material on the record. On the aforesaid premises, he has contended that the impugned order is based on no evidence. He has submitted that at the time of passing the impugned order of compulsory retirement against the petitioner, the departmental inquiry in respect of which chargesheet dated 2ndsAugust,1986 issued was already pending against the petitioner and the same was relied upon by the committee and, therefore, according to Learned advocate Mr.Oza for the petitioner, the said order of compulsory retirement is required to be quashed and set aside.

##. Learned Addl. Advocate Mr. Shelat appearing for the respondent authorities has submitted that the respondent authorities are having absolute powers under the relevant rules to take decision against the officer if his integrity is considered to be doubtful by the authority. The authority has rightly considered the pending inquiry and earlier inquiry and also lack of supervision of the petitioner and tampering with the cement registers and allowing less use of cement and poor workmanship and, therefore, according to Mr. Shelat, the committee has rightly considered the overall performance of the petitioner and relevant factors before recommending the case of the petitioner for compulsory retirement and this court should not act as an appellate court upon the decision of the committee.

##. In the backdrop of the aforesaid factual aspects, let us consider the law on the point of premature retirement enunciated by the Supreme Court in catena of pronouncements made by it.

In Union of India v. Col. J.N. Sinha, AIR 1971 SC 40, the Supreme Court has explained 'public interest' and observed that the object of premature retirement of a Government servant is to weed out the inefficient, corrupt, dishonest employees from the Government service. The public interest in relation to public administration means that only honest and efficient persons are to be retained in service while the services of the dishonest

or the corrupt or who are almost deadwood, are to be dispensed with.

The Supreme Court has expressed similar view in the case of H.C. Gargi v. State of Haryana, (1986) 4, SCC 158.

In Gian Singh Mann v. High Court of Punjab & Haryana, (1980) 4 SCC 266, it was pointed out that the expression 'public interest' in the context of premature retirement has a well-settled meaning. It refers to cases where the interests of public administration require the retirement of a Government servant who with the passage of years has prematurely ceased to possess the standard of efficiency, competency and utility called for by the Government service to which he belongs.

In Kailash Chandra Agarwal v. State of M.P., (1987) 3 SCC 513, it was pointed out that the order of compulsory retirement, if taken in public interest, could not be treated as a major punishment and that Article 311 (2) of the Constitution could not be invoked, as the employee concerned was no longer fit in public interest to continue in service and, therefore, he was compulsorily retired.

In Union of India v. M.E. Reddy, (1980) 2 SCC 15, it was pointed out that the object of compulsory retirement was to weed out the deadwood in order to maintain a high standard of efficiency and initiative in service. Rule 16 (3) of the All-India (Death-cum-Retirement) Rules, 1958, empowered the Government to compulsorily retire officers of doubtful integrity. The safety valve of public interest was the most powerful and the strongest safeguard against any abuse or colourable exercise of power under that Rule.

A three-Judge Bench of the Supreme Court in the case of Baikuntha Nath Das v. Chief Distt. Medical Officer, (1992) 2 SCC 299 laid down following five principles:

"(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective

satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter -of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

The aforesaid principles were affirmed by another three Judge Bench of the Supreme Court in the case of Posts & Telegraphs Board v. C.S.N. Murthy, (1992) 2 SCC 317.

In K. Kandaswamy v. Union of India, (1995) 6 SCC 162, the Supreme Court has observed as under:

"While exercising the power under Rule 56 (j) of

the Fundamental Rules, the appropriate authority has to weigh several circumstances in arriving at the conclusion that the employee requires to be compulsorily retired in public interest. The Government is given power to energise its machinery by weeding out deadwood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service. When the appropriate authority forms bona fie opinion [that compulsory retirement of the Government employee is in the public interest, Court would not interfere with the order."

In M.S. Bindra v. Union of India, (1998) 7 SCC 310, the Supreme Court has considered the ratio laid down in Baikuntha Nath's case (supra) and held as under:

"Judicial scrutiny of any order imposing premature compulsory retirement is permissible if the order is either arbitrary or malafide or if it is based on no evidence. The observation that principles of natural justice have no place in the context of compulsory retirement does not mean that if the version of the delinquent officer is necessary to reach the correct conclusion, the same can be obviated on the assumption that other materials alone need be looked into."

It was further observed in the said case as under:

"While viewing this case from the next angle for judicial scrutiny, i.e., want of evidence or material to reach such a conclusion, we may add that want of any material is almost equivalent to the next situation that from the available materials, no reasonable man would reach such a conclusion."

##. The ratio laid down by the Supreme Court in the above referred to judgments indicates that in order to find out whether any Government servant has outlived his utility and is to be compulsorily retired in public interest for maintaining an efficient administration, an objective view of overall performance of that Government servant has to be taken before deciding, after he has attained the age of 50 years, either to retain him further in service or to dispense with his services in public interest, by giving him three months' notice or pay in lieu thereof. The performance of a Government servant is reflected in the annual character roll entries

and, therefore, one of the methods of discerning the efficiency, honesty or integrity of a Government servant is to look at his character roll entries for the whole tenure from the inception to the date on which decision for his compulsory retirement is taken. It is obvious that if the character roll is studded with adverse entries or the overall categorization of the employee is poor and there is material also to cast doubts upon his integrity, such a Government servant cannot be said to be efficient. Efficiency is a bundle of sticks of personal assets, thickest of which is the stick of "integrity". If this is missing, the whole bundle would disperse. A Government servant has, therefore, to keep his belt tight. The purpose of adverse entries is primarily to forewarn the Government servant to mend his ways and to improve his performance. That is why, it is required to communicate the adverse entries so that the Government servant to whom the adverse entry is given, may have either opportunity to explain his conduct so as to show that the adverse entry was wholly uncalled for, or to silently brood over the matter and on being convinced that his previous conduct justified such an entry, to improve his performance.

##. As against the aforesaid submissions, Mr. Y.N. Oza, learned advocate for the petitioner has placed heavy reliance on the judgment of the Supreme Court in the case of State of Gujarat v. Suryakant Chunilal Shah, 1999 (3) GLR 2060 and submitted that even filing of the charge-sheet on the basis of the FIR lodged against an employee is not a valid ground to pass an order of premature retirement of that employee and maintained that the ratio laid down in aforementioned case is the complete answer to the contention advanced by Mr. Shelat.

##. So far as the judgment relied upon by Mr. Oza is concerned in that case the employee - Suryakant Chunilal Shah - was ordered to be compulsorily retired since FIR was lodged against him. He challenged the said order before the learned Single Judge of this Court who rejected the petition by holding that the order of compulsory retirement is just and valid. Against the said order the petitioner moved the Division Bench of this Court by filing Letters Patent Appeal and the said Letters Patent Appeal came to be allowed by quashing and setting aside the order of compulsory retirement passed against the petitioner. The State of Gujarat went in appeal before the Supreme Court by filing Special Leave Petition. After referring to the catena of previous judgments of the Supreme Court, the Bench has made

following weighty observations:

"Applying the principles laid down above to the instant case, what comes out is that in compulsorily retiring the respondent from service, the authorities themselves were uncertain about the action which was to be taken ultimately against him. In fact, there was hardly any material on the basis of which a bona fide opinion could have been formed that it would be in public interest to retire the respondent from service compulsorily. The material which was placed before the Review Committee has already been mentioned above. To repeat, the respondent was promoted in 1981; the character roll entries for the next two years were not available on record; there were no adverse entries in the respondent's character roll about his integrity; he was involved in two criminal cases, in one of which a final report was submitted while in the other, a charge-sheet was filed. Although there was no entry in his character roll that the respondent's integrity was doubtful, the Review Committee on its own, probably on the basis of the F.I.R.s lodged against the respondent, formed the opinion that the respondent was a person of doubtful integrity. The Review Committee was constituted to assess the merits of the respondent on the basis of the character roll entries and other relevant material and to recommend whether it would be in public interest to compulsorily retire him from service or not. The Review Committee, after taking into consideration the character roll entries and noticing that there were no adverse entries and his integrity was, at no stage, doubted, proceeded, in excess of its jurisdiction, to form its own opinion with regard to the respondent's integrity merely on the basis of the F.I.R.s lodged against him. Whether the integrity of an employee is doubtful or not, whether he is efficient and honest, is the function of the appointing authority or the immediately superior of that employee to consider and assess. It is not the function of the Review Committee to brand, and that too, offhand, an employee as a person of doubtful integrity. Moreover, the Review Committee did not recommend compulsory retirement. It was of the opinion that the respondent had committed grave irregularity and that he must be retained in

> service so that he may ultimately be dealt with and punished severely. The Secretary and the Chief Secretary, who considered the recommendations of the Review Committee, had other ideas. They thought that the investigation and subsequent prosecution of the respondent would take a long time and that it would be better to immediately dispense with his services by giving him the temptation of withdrawing the criminal cases and retiring him compulsorily from service, provided he does not approach the Court against the order of compulsory retirement. This proposal too was not immediately acted upon and it was thought that nobody could say whether the order of compulsory retirement would be challenged by the respondent before the Court or he would merely submit to it on the temptation that the criminal cases against him would be withdrawn. It was at this stage that the order of compulsory retirement was passed."

##. Applying the above principles laid down in the aforesaid cases, what comes out is that while prematurely retiring the petitioner from service the authority has not recorded a reasoned order. The authority has only mentioned that the petitioner is made to retire in public interest but has not formed requisite opinion not only subjective satisfaction but objective and bonafide based on relevant material. In fact there was hardly any material on which a bonafide opinion could be formed which would be in public interest that the petitioner should be compulsorily retired.

##. In the case before hand, the petitioner was promoted to the post of Superintending Engineer by order dated 9th February, 1983 which is subsequent to the departmental inquiry in respect of the chargesheet which was served to the petitioner on 22nd January,1979 and the punishment which was imposed by the department to the petitioner for stoppage of one annual increment without cumulative effect.

##. In respect of the chargesheet dated 2nd August, 1986, ultimately, the punishment was imposed by the department on 2nd March, 1993 wherein deduction of Rs.100/- p.m. from the petitioner's pension for a period of five years was ordered to be made by way of punishment after consultation with the Gujarat Public Service Commission. According to the respondents, if both the cases are serious in nature and if it is relating to the

doubtful integrity of the petitioner, then, the respondents are able to take appropriate action and decision in respect of punishment of pending two inquiries against the petitioner but it is pertinent to note that in both the cases, considering the nature of punishment that the departmental inquiry on the basis of the chargesheet dated 22nd January 1979 which was concluded in the year 1981 and wherein the concerned Superintending Engineer has accepted the statement of defence of the petitioner and it was recommended by the concerned Superintending Engineer that the petitioner may be exonerated by accepting his defence. Thereafter, the Government has called for the opinion of the Superintending Engineer (Quality Control) and the Superintending Engineer (Quality Control) agreed with the findings given by the concerned Superintending Engineer but he found that the petitioner was negligent in over all supervision work and ultimately the department has suggested punishment of censure and thereafter the competent authority in the Government has decided that the penalty of withholding of one annual increment without future effect should be imposed against the petitioner and, therefore, considering the nature of punishment in both the cases which were heavily relied upon by the committee in its report for taking decision in and considering the circumstances for having doubtful integrity of the petitioner, then, if that is the real fact, which was found by the department on the relevant point of time, then,the department was able to take appropriate decision in respect of the penalty and the department may pass order of dismissal against the petitioner but there was no sufficient evidence to prove the serious misconduct as alleged and, therefore, minor punishment was ordered to be imposed by the department which suggests that the allegations and misconduct for which departmental inquiry was initiated against the petitioner were not such serious charge or if that was serious charge, then there was no sufficient evidence to prove the same against the petitioner. Now in that circumstances, the department cannot take resort of punishing the petitioner under the guise of exercise of powers under rule 161 of the Bombay Civil Service Rules. It is also equally true that the absolute powers enjoyed by the Government under Rule 161 of the Bombay Civil Service Rules cannot be exercised against any officer for to cut short the departmental inquiry or to punish an officer for which the department was not able to punish for want of evidence against him or because of insufficiency of evidence against the petitioner in respect of pending inquiry against the petitioner. It is also necessary to note that in entire career of 32 years

of his service, not a single adverse remark has been communicated to the petitioner except one which was ultimately expunged. This fact has also been mentioned by the committee in its report as aforesaid.

##. Learned Addl. A.G. Mr. Shelat relied upon the decision in case of State of Orissa and others versus Ram Chandradas (supra) wherein it has been observed by the apex court that the object always is the public interest. The material question is whether the entire record of service was considered or not. It is not for the court or the tribunal to see whether the decision of the Government to compulsorily retire the servant is justified or not. It is for the Government to consider the same and take proper decision in that behalf. As stated earlier, it is settled law that the Government is required to consider the entire record of service Merely because promotion has been given and adverse entries were made cannot be made a ground that the compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant has to be opined by the tribunal. What would be relevant is whether upon that state of record as reasonable prudent man would reach such a decision ? The compulsory retirement is not a punishment and the Government is entitled to consider the over all necessity to continue the Government servant in service after he attained required length of service or qualified period of service for pension. I have considered the decision cited by the learned Addl. A.G. Mr. Shelat in support of his contentions.In the present case, after perusal of the report of the committee, it is apparent that the committee found that the confidential reports of the petitioner in entire service are generally good except that in the year 1978-79 where adverse remarks were communicated to the petitioner which were subsequently expunged. The committee has considered two things in its report namely one departmental inquiry which was concluded in the year 1981 and the second departmental inquiry in respect of which chargesheet dated 2nd August, 1986 for construction of multi storeyed building namely Narmada Bhavan at Baroda which has suffered severe cracks on all the beams of the floors. Therefore, the Committee has considered both the cases as a serious case and has come to the different conclusion that it may be safely presumed that this case relates to lack of integrity. Therefore, before the committee, except these two departmental inquiries, no other material was available for taking decision for compulsory retirement of the petitioner. There was no other material cited or

referred by the committee in respect of the established fact of lack of integrity of the petitioner. Though the petitioner was punished in the two departmental inquiries, the committee has taken into consideration the same material for coming to the conclusion that the petitioner is required to be retired compulsorily is nothing but a penalty under the pretext of compulsory retirement of the petitioner. In other words, it is amounting to reviewing the punishment order under the guise of exercise of powers by the department while exercising the powers under Rule 161 of the Bombay Civil Service Rules. Such method cannot be permitted to be adopted by the respondents, otherwise, no government servant will be safe in the hands of the authority because ultimately in the departmental inquiry, if the punishment has been imposed by the department by taking into consideration the report of the inquiry officer and looking to the nature of misconduct alleged, minor punishment was imposed, then considering the very same records of two departmental inquiries against the petitioner, if it is permitted to review the decision of punishment by the committee while exercising the powers under Rule 161 of the Rules, such exercise of powers would amount to reviewing the order of punishment imposed upon the employee at the conclusion of the departmental inquiry held against him and such thing cannot be permitted and it would amount to colourable exercise of powers Considering the report of the committee, according to my opinion, no reasonable man would come to such conclusion on the basis of the material or evidence on record which was considered by the committee and, therefore, in the facts and circumstances of the present case, the decision cited by Mr.Shelat is not applicable to the present case and the decision of the committee is not having the standards of reasonable man or prudent man and there was no other evidence except two departmental inquiries which cannot prove doubtful integrity of the petitioner or which cannot justify the decision or conclusion of the committee that the petitioner is having doubtful integrity and, therefore, the impugned order of compulsory retirement dated 8th August, 1986 is required to be quashed and set aside.

##. It is necessary to refer to the observations made by the apex court in case of M.B. Bindra versus Union of India reported in AIR 1998 SC 3058 paragraph 13 which reads as under:

While viewing this case from the next angle for judicial scrutiny i.e want of evidence on material to reach such a conclusion, we may add that want of any

material is almost equivalent to the next situation that from the available material no reasonable man would reach such a conclusion. While evaluating the materials the authority should not altogether ignore the reputation in which the officer was held till recently. The maxim `Nemo Firut Repente Turpissimus' (no one becomes dishonest all on a sudden) is not unexceptional but still it is salutary guideline to judge human conduct, particularly in the field of Administrative Law. The authorities should not keep the eyes totally closed towards the overall estimation in which the delinquent officer was held in the recent post by those who were supervising him earlier. To dunk as officer into the puddle of `doubtful - integrity', it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an office with the lable - "doubtful integrity".

##. It is also necessary to refer to the decision of M.S. Bindra (supra) and case of Madan Mohan versus State of Bihar AIR 1999 SC 1018. These two decisions pertain to compulsory retirement and considering the facts and circumstances of this case, as also the facts of the decisions cited at the bar wherein it has been held that the judicial scrutiny of the order of compulsory retirement is permissible if the order is either arbitrary or mala fide or it is based on no evidence.

##. Learned advocate Mr. Oza for the petitioner has relied upon the decision of the division bench of this court in special civil application no. 28 of 1990 decided in October, 1990 wherein the case of Ram Iqbal Sharma versus State of Bihar and another reported in AIR 1990 SC 1308 has been considered and followed by the division bench of this court and in the context of rule 161 of the BCSRs, found that even if the order of premature retirement is couched in innocuous language without making any imputations against the government servant who is directed to be compulsorily retired from service, the Court, if challenged in appropriate cases, can alift the veil to find out whether the order is based on any misconduct of the government servant concerned or whether the order has been made bonafide and not with any oblique or extraneous purposes. In the case before the division bench, the court found that the employee in that

case was not only permitted to cross the efficiency bar but he was promoted to the higher post. The court, therefore, found that the employee could not be regarded as dead wood. The Court found that it was the case of the State Government, in its affidavit in reply, that number of departmental inquiries were pending against the employee and it was further their case that the integrity of the employee was doubtful. The division bench, therefore, found that in fact, the order passed against the employee was not an order of premature retirement simpliciter in exercise of the powers conferred by rule 161 of the BCSRs but in pith and substance, it was a punitive order, the order was a short cut to a regular departmental inquiry under Article 311 of the Constitution. The decision of the division bench of this court in special civil application no. 28 of 1990 dated October, 1990 has been followed and relied by the division bench of this court in special civil application no. 3505 of 1990 dated 30.1.1991. In the said decision also, the division bench of this court held that the order of compulsory retirement is virtually was an order of removal of an employee from the service though the order might have been worded but in reality, the action was penal in nature. Similarly, in case of Shri J.M. Mehta versus State of Gujarat, reported in 1991 (1) GLH 361, learned single Judge of this Court (Coram : S.D.Shah,J.) observed that no doubt the impugned order of premature retirement is a camouflage for an order of dismissal/removal. In fact, the order is passed as a substitute to holding departmental inquiry against the petitioner with respect to four charges as recommended by the Vigilance Commissioner. The State Government has, thereby, avoided to hold regular departmental inquiry and to follow the procedure prescribed under Art. 311 (2) of the Constitution and has put an end to these services of the petitioner by resorting to powers under rule 161 of the BCSRs. The order of premature retirement cannot be used as a short cut to by pass the regular departmental inquiry under Art. 311 (2) of the Constitution. In fact, the very object of drastic powers given by Rule 161 of the BCSRs to retire a Government servant prematurely in exceptional cases and the object would be frustrated if the Government is permitted to resort to the said powers by openly stating that it is exercising the said powers despite the fact that what is recommended against the employee is holding of departmental inquiry. Similarly, in case of Shri R.N.Thakore versus State of Gujarat, Special Civil Application No. 5643 of 1989 decided on 28th April, 2000 by the learned Single Judge of this Court (Coram:A.M.Kapadia,J.), the learned Single Judge of this Court has considered the decision of the

apex court in case of State of Gujarat versus Suryakant Chunilal Shah reported in 1999 (3) GLR page 2060. The learned Single Judge in the said decision has come to the conclusion that the in the order of compulsory retirement passed against the petitioner, the authority has not recorded a reasons. The authority has not only mentioned that the petitioner is made to retire in public interest but has not formed requisite opinion, not only subjective satisfaction but objective and bona fide based on relevant material. It has been observed that there was hardly any material on which a bona fide opinion could be formed which would be in public interest that the petitioner should be retired compulsorily. So far as that case is concerned, it has been observed that the issuance of chargesheet alleging that the petitioner has remained absent unauthorisedly for a period of eight months is not a valid ground for prematurely retiring him from service.

##. In case of Narendrakumar V. Parikh versus State of Gujarat, reported in 1999 (1) GLH page 816, this Court (Coram:M.R.Calla,J.) has held as under on page 817 of the report :

"Now the question comes as to what would be the effect of the pendency of the departmental inquiry at the time when the order of compulsory retirement was passed and of the fact that in the body of the impugned order itself, it was mentioned that the pending inquiry shall continue against the petitioner. Whether the impugned order of compulsory retirement is rendered to be punitive and stigmatic on these two grounds is the moot question for the consideration of the validity of the present impugned order dated 19.6.91. ... In the facts of the present case also, it is very clear that not only that the inquiry was pending, the Committee, while considering the case of compulsory retirement in May, 1989,in fact, has taken into consideration the charges which formed the subject matter of inquiry and which were yet to be inquired upon. Thus, the unproved charges have been taken into consideration for the purpose of taking the action of compulsory retirement. Further, it is also a factually admitted position that the factum of the pendency of the ACB inquiry was also considered by the committee and in fact subsequent to the petitioner's retirement nothing has been found against the petitioner in the ACB inquiry. True it is that in normal course an

order of compulsory retirement is neither punitive nor it cannot be said that it entails any penal consequences as such because the order of compulsory retirement on the ground of public interest does not deprive an employee any of his earned benefit but the law is equally settled that in the facts of a given case if it is made to appear before the Court that the order of compulsory retirement is only a cover and in act the order is founded on misconduct and that it has been passed only by short circuiting the procedure of inquiry or it is otherwise made to appear before the Court on the basis of the circumstances attendant and preceding to the passing of the order of compulsory retirement that in fact the allegations of misconduct formed the heart and soul of the compulsory retirement, the form of the order is not conclusive and we have to go to the substance rather than the form and the Court has a right to unveil, remove the cover to examine the real nature of the order and for that purpose the Court can go behind the order also so as to determine the true nature of this order.....Therefore, in the facts of the present case, it is not simply a case in which the order of compulsory retirement has been passed during the pendency of the inquiry and, therefore, it should be set aside but it goes a step further because it is found and verified as a matters of fact on the basis of the position held out on behalf of the basis of the position held out on behalf of the respondent itself that the charges and allegations, which were the subject matter of inquiry were taken into consideration by the Committee, which considered the petitioner's case for compulsory retirement on 31.5.1989 and it also took into consideration the allegations which formed the subject matter of ACB Inquiry, which was pending at the time and in which nothing was found against the petitioner subsequently..... Taking into consideration the facts and circumstances of this case in its entirety, this court has no hesitation in holding that the impugned order dated 19.6.91 is a punitive order, it seeks to cast aspersion or stigma against the petitioner, the order is founded on allegations of misconduct and it cannot be said that this order is based on a plain and a simple appraisal of his ACRs only."

##. In the said decision, the learned Single Judge

has considered the decision of apex court as well as this court in detail wherein AIR 1984 SC 636 in case of Anoop Jayswal versus Government of India and in the case of State of UP versus Abhai Kishor Masta reported in 1995 I SCC page 336 and also considered the case of Ram Iqbal Sharma versus State of Bihar reported in AIR 1990 SC 1368.

In this case, the order of compulsory retirement dated 8.8.86 has been passed under rule 161 of the BCSRs,1959 which reads as under:

"161.. (I)(a) Except as otherwise provided in the other clause of this Rule, the date of compulsory retirement of a Government Servant other than a Clerk IV servant. Is the date on which he attains the age of 58 years.

Provided -

(iii) He may be retained in service after the date of compulsory retirement only with the previous sanction of the Government on public grounds which be recorded in writing.

(aa) Notwithstanding anything contained in clause(a):

(1) An appointing authority shall, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant to whom clause (a) applies, by giving him notice of not less than three months in writing or three months' pay and allowance in lieu of such notice :

(1) if he is in Class I or Class Ii service or post or in any unclassified gazetted post, the age-limit for the purpose of direct recruitment to which is below 35 years, on or after the date on which he attains the age of 50 years, and

(2) if he is in any other service or post, the age limit for the purpose of direct recruitment to which is below 40 years, on or after the date on which he attains the age of 55 years;

(ii) any Government servant to whom clause (a) applies may, be giving notice of not less than three months in writing to the appointing authority, retire from service after he has attained the age of 50 years, if he is in Class I

or Class II service or post or in any unclassified gazetted post the age-limit for the purpose of recruitment to which is below 35 years and in another case, after he has attained the age of 55 years;

Provided that it shall be open to the appointing authority to withhold permission to retire to a Government servant who is under suspension, or against whom departmental proceedings are pending or contemplated and who seeks to retire under this sub clause.

(b) A Government servant .... "

Sub-clause (aa) of Clause (1) of this Rule gives power to the appointing authority to retire a Government servant in public interest by giving him three months' notice in writing or three months' pay in lieu thereof at any time after the date on which he has attained the age of 50 years.

Sub clause (aa) of clause (2) of this rule gives powers to the appointing authority to retire a Government servant in public interest by giving him three months' pay in lieu thereof at any time after the date on which he has attained the age of 55 years. What is public interest was explained in the classic decision of the apex court in Union of India versus Col. J.N.SInha reported in AIR 1971 SC 40. It was pointed out that the object of premature retirement of a Government Servant was to weed out the inefficient, corrupt,dishonest employees from the Government service. The public interest in relation to public administration means that only honest and efficient persons are to be retained in service while the services of the dishonest or corrupt or who are almost dead wood are to be dispensed with. This was also the view of the apex court in the case of H.C. Gargi versus Haryana reported in AIR 1987 SC 65 and in the case of Giansinh Mann versus H.C. of Punjab and Haryana reported in AIR 1980 SC 1894 and in the case of Kailashchandra Agarwal versus State of MP Reported in AIR 1987 SC 1871 and in the case of Union of India versus M.E. Reddy reported in AIR 1980 SC 563. The safety Valve of Public interest was the most powerful and the strongest safeguard against any abuse or colourable exercise of power

under the rule. The opinion of the authority must be based on the material on record, otherwise, it would amount to arbitrary or colourable exercise of power. In case of K. Kundaswamy versus union of India, (1995) 6 SCC 162, it has been held that the decision to compulsorily retire an employee can therefore be challenged on the ground that requisite opinion was based on no evidence or had not been formed or the decision was based on collateral grounds or that was an arbitrary decision. In the case of S.R. Venkataraman versus Union of India reported in (1979) 2 SCC page 491, it has been held that the power of compulsory retirement as a gross abuse of power as there was nothing on the record to justify and support the order. In case of Baldevraj Chandha versus Union of India reported in (1980) 4 SCC 321, it has been held that although the purpose of F.R. 56 was to weed out worthless employees without punitive extremes if under the guise of public interest an order of premature retirement is made for any other purpose, it would be the surest menace to public interest and the order must fail for unreasonableness, arbitrariness and disguised dismissal.

##. Recently, the apex court in the case of Madan Mohan Chaudhary versus State of Bihar and Others reported in 1999 SCC (L/S) page 700,"has considered the question of compulsory retirement of judicial officer. In the said decision, the apex court has considered the decision of apex court in the case of State of Gujarat versus Suryakant Chunilal Shah reported in (1999) (1) SCC page 529 and also considered the decision of apex court Baikunthnath Das case reported in AIR 1992 SCC page 1020 and also considered five principles were laid down in that case. Ultimately in the case of Madan Mohan Chaudhary (supra) has held that no material on record to reasonably form an opinion that compulsory retirement was in public interest. Appellate Judicial Officer whose performance and integrity was otherwise reported not bad, compulsorily retired on the basis of a single act of granting anticipatory bail in a criminal case under sec.307 of IPC. No ulterior motive found in the appellant's order though high court on judicial side strongly criticised it and appellant's compulsory retirement on this count held not warranted and, therefore, set aside.

##. The learned Sr. Advocate Mr. Oza has raised the

contention in respect to rule 161 of the BCSRs apply to the Class II or II Service or Post, if an employee attains the age of 50 years and, therefore, under the said rules, the authority is not entitled to pass an order of compulsory retirement if an officer has attained the age of fifty five years. The second contention raised by learned advocate Mr. Oza that that under rule 161(c)(ii) of the Rules which is applicable to the present case because the petitioner working in the post Superintending Engineer, therefore, the authority have no power to pass order under rules 161 of the Rules against the petition. Said contention of the learned advocate MR. Oza has been replied by the respondent in the affidavit in reply filed by Shri Anil Bhatt, Under Secretary, R. & B. Department dated 27.7.2000. According to the respondents, rule 161 (1)(aa)(I)(1) of the Rules provides that an appointing authority shall, if he is of the opinion that it is in the public interest so to do have absolute right to retire any Government servant to whom clause (a) applies by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice if he is in class I or Class II service or post or in any unclassified gazetted post, the age limit for the purpose of direct recruitment to which is below 35 years, on or after the date on which he attains the age of 50 years, and if he is in any other service or post, the age limit for the purpose of direct recruitment to which is below 40 years on or after the date on which he attains the age of 55 years. These guidelines prescribe two reviews one at the age of 50 years and another is the age of 55 years. Therefore, the rules empower the appointing authority to retire any Class I or II Officer on or after the date on which he attains the age of 50 years. It is also required to be noted that under Rule 161 (1)(a)(ii), such power is with the authority to retire the officer after the date on which he attains the age of 55 years. Therefore, the contention of Mr. Oza cannot be accepted that the appointing authority is not entitled to retire any Class I or II employee if he attains the age of 55 years. In respect of the second contention, the provision contained in rule 161 (c)(II) of the Rules applies only to the members of the Bombay Service Engineer, Class I only and the petitioner was not the member of the Bombay Service of Engineer Class I. Therefore, considering the reply of the respondents that the petitioner was promoted to the post of Superintending Engineer by the Government of Gujarat vide notification dated 9.2.83, at the time of retirement the petitioner was belonging to Gujarat Engineer Service Cadre and not the Bombay Service Engineer Cadre and, therefore, the

provisions of Rule 161 (c)(II) of the rules are not attracted to the petitioner.

##. Learned Addl. A.G. Mr. Shelat has relied upon the decision of the apex court in case of State of Orissa versus Ramchandra Das (supra) wherein the apex court has examined the question of compulsory retirement under rule 7(a) of the Orissa Service Code and has considered that it is true that the Government servant was allowed to cross the efficiency bar to enable him to avail the benefits to draw the higher scale of pay after crossing the efficiency bar. The adverse remarks made are after promotion, even otherwise, the remarks form part of service record and the character roll. The record of inquiry on conduct also would be material, though minor penalty may be imposed on given facts and circumstances to act of misconduct, never the less remains part of the record for overall consideration to retire a Government servant compulsorily. After considering the said decision of the apex court in case of State of Orissa, (supra), recently, the apex court has considered the very similar situation in case of the High Court of Punjab and Haryana versus Eshwarchand Jain and another reported in 1999 SCC (L/S) page no. 881 wherein the apex court has, after considering the facts of the case, observed that the respondent was retired while under suspension. The High Court, on its administrative side decided to keep disciplinary proceedings against the respondent pending for the purpose of imposing a cut on his retirement benefits. An obvious conclusion is that the action of the High Court was based on the allegations of misconduct which was for subject matter of inquiry and which appears to be the basis for recording adverse remarks by the High Court for the year 1991-92 There is, therefore, substance in the arguments of the respondents that the High Court found a short cut to remove him from service when the order of retirement was based on the charge of misconduct, the subject matter of inquiry. The impugned order of compulsory retirement though innocuously worded is, in fact, an order of removal from service and cannot be sustained.

##. The facts of the present case are almost identical to the facts in case of Eshwarchand Jain (supra). The impugned order of compulsory retirement is dated 8.8.1986. Prior to that, on 2.8.1986, the petitioner was served with a chargesheet for the misconduct relating to construction of multistoreyed building namely Narmada Bhavan at Baroda. At the time of passing of the impugned order, said inquiry was pending. Even in order dated 8.8.1986, it is mentioned that the

departmental inquiry in respect to the chargesheet dated 2.8.1986 shall remain continue after the retirement of the petitioner under rules 189(A) of the Rules. Ultimately, in the said departmental inquiry which was continued against the petitioner after his compulsory retirement was concluded in the year 1993, by order dated 2.3.1993, punishment of deduction of Rs.100/- per month from the pension of the petitioner for a period of five years was inflicted on the petitioner after consultation with the Gujarat Public Service Commission. In respect of the chargesheet dated 22.1.1979 to which the reply was submitted by the petitioner on 11.5.1979, the concerned Superintending Engineer has accepted the defence statement of the petitioner and he has opined that the petitioner may be exonerated of the charges levelled against him. However, the Government has called for the opinion of the Superintending Engineer, Quality Control, who also agreed with the opinion given by the concerned Superintending Engineer but he found that the petitioner was negligent in his over all supervision. Therefore, the department has suggested the penalty of censure but the competent authority in the Government decided that a penalty of withholding of one increment without future effect be imposed.

##. In view of these facts on record, I have considered the report of the Committee. In the said report, the Committee examined the confidential reports of the petitioner and has observed that the same are generally good except that in the year 1978-79, wherein adverse remarks were communicated to the petitioner which were ultimately expunged. The committee had relied upon two departmental inquiries one which was in respect of the chargesheet dated 22.1.79 and another in respect to the chargesheet dated 2.8.1986. As regards the chargesheet dated 22.1.1979, the punishment was already imposed and in respect of the second chargesheet dated 2.8.1986, the departmental inquiry was pending. The Committee has considered that this is a serious case and come to conclusion that it may safely be presumed that this case relates to lack of integrity and even the other decided case in 1981 in respect of the chargesheet dated 22.1.1979 which related to tampering of cement registers which also leads to lack of integrity. Therefore, the committee has considered lack of integrity of the petitioner because of two chargesheet served to the petitioner for which one was concluded and second was pending. In the said report, nowhere, the Committee has observed about the public interest. How the public interest or administrative has been adversely affected has not been disclosed by the committee. Not only that

but there was no material on record except two inquiries. There is no material on record to show that the committee has considered public interest. It amounts to non application of mind and it is a case of no evidence in respect of public interest. While exercising the power under rule 161, it is a condition precedent for the appointing authority while exercising the absolute right to retire any Government servant on the opinion that it is in the public interest so to do, such condition precedent in respect of the public interest is not at all considered by the committee as well as by the appointing authority, who passed the order of compulsory retirement of the petitioner on dated 8.8.1986. If under the guise of public interest an order of the premature retirement is made for any other purpose, it would be surest menace to public interest and the order failed for unreasonableness, arbitrariness and disguised, dismissal. Therefore, in the present case, the order of retirement is punitive and it was used as a short cut to disciplinary proceeding which was in fact virtually a removal from service. Therefore, according to my opinion, the involvement of the employee in a departmental inquiry or alleged misconduct does not mean that he is guilty. He is still to be tried in a departmental proceedings and truth has to be found ultimately, by the competent authority or the inquiry officer. But before that stage is reached it would be highly improper to deprive an officers livelihood merely on the basis of his involvement. Therefore, considering the report of the committee an order of compulsory retirement passed by the authority dated 8.8.1986, according to my opinion, there was no material before the reviewing committee in as much as there were no adverse remarks in the character rolls, entries, the integrity was not doubtful at any time. The character roll entries subsequently to the petitioner promotioner's promotion to the post of superintending engineer Class I were not adverse to the petitioner and on the contrary, as per the opinion of the review committee, all the confidential reports of the petitioner were found to be generally good. In such circumstances, it could not come to the conclusion that the petitioner was a man of doubtful integrity nor could have any one else come to the conclusion that the petitioner was a fit person to be retired compulsorily from the service. Therefore, the order of the compulsory retirement passed against the petitioner dated 8.8.1986 in the circumstances of the case was punitive, amounts to disguise, dismissal having been passed for the collateral purpose of his immediate removal from service rather in public interest.

##. Another recent decision of the apex court in the case of Rajat Baran Roy and others versus State of West Bengal and others reported in 1999 SCC (L/s) page 852 wherein it is observed in paras 15 and 16 as under:

"15. We will now examine the contention of the respondents that the impugned order can be independently justified in view of the power vested in them by virtue of Rule 75 (aa) of the West Bengal Service Rule Part I. The said rule reads as thus :

'Notwithstanding anything contained in this rule the appointing authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire a government employee giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice-

(i) If he is in Group A or Group B (erstwhile gazetted) service of post and had entered government service before attaining the age of 35 years, if he has attained the age of 50 years, and

(ii) In all other cases after he has attained the age of 55 years'

16. A perusal of this rule shows that this rule can be invoked for the purpose of retiring a government servant in public interest on satisfying the conditions mentioned in sub clause (1) and (2) of that rule. A careful perusal of the impugned orders nowhere shows that the said orders are being issued in public interest which is a condition precedent for invoking this rule. Nor does it advert anywhere in the impugned orders in regard to the conditions specified in sub paras (1) and (2) of the said rule. If we have to examine the impugned orders in the light of this rule then the same has to be held to be bad in law for non application of mind and want of material particulars which are mandatory for invoking the said rule. Therefore, the argument of the respondents seeking to justify the impugned orders based on Rule 75(aa) of the said

rules also has to be rejected. "

##. In other recent decision in case of High Court of Punjab and Haryana versus versus Ishwarchand Jain and others reported in 1999 SCC (L/S) page 881, wherein the recent judgment in the case of Madan Mohan Chaudhary versus State of Bihar ((Supra) has been considered. Following observations in para 22 and 30 and 31 are as under:

"22. The foremost question arising for our consideration is, if the order of premature retirement of Jain is based on sound legal principles and is not punitive in nature. Further question connected with this would be if recording of adverse remarks in ACR for the year 1991-92 is justified in the circumstances and whether the Full Court was misled by the precis of ACR prepared by the Registry for the meeting of the Full Court held on 12.12.1995. "

"From the resolutions of the Full Court of 12.12.1995 and 11.1.1996, it is apparent that Jain was retired while under suspension. It appears that the High Court on its administrative side decided to keep disciplinary proceedings against Jain pending for the purpose of imposing the cut on his retrial benefits. The conclusion is obvious that the action of the High Court in retiring Jain was based on the allegation of misconduct which was the subject matter of enquiry before a Judge of the High Court and which appears to us to be the basis for recording of adverse remarks by the High Court in ACR of the officer for the year 1991-92. There is substance in the arguments of Mr. M.N.Krishnamani, learned counsel for Jain that the High Court found a short cut to remove jain from service when the order of retirement was based on the charges of misconduct, the subject matter of enquiry. We agree with Mr. Krishnamani that the impugned order of compulsorily retiring Jain though innocuously worded is in fact an order of his removal from service and cannot be sustained. The High Court, on its judicial side, was correct in setting aside the order compulsorily retiring Jain and allowing the writ petition of Jain to the extent

mentioned in the impugned judgment. In this view of the matter, it is not necessary for us to consider other submissions made before us if Jain could at all have been compulsorily retired under rule 3.26 of the Punjab Civil Services Rules, Vol.I Part I, he being a Member of the Superior Judicial Service.

31. Though in Baikuntha Nath Das case, this court has laid principles when there is challenge to compulsory retirement of an officer. In that case, the appellant was not a judicial officer. In the case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court, on the judicial side has to exercise great circumspection in setting aside that order. Here it is a complement of all the Judges of the High Court who go into the question. It may not be possible that in all cases, evidence would be forthcoming about the doubtful integrity of a judicial officer and at times the Full Court has to act on the collective wisdom of all the Judges. "

"The question is as to what is the scope of such of judicial review ? Are the Courts justified in re-appreciating and reassessing evidence and material and in reaching conclusion different from that reached by the appropriate authority ? Should the courts dwelve deep into the service record and try to find out factors favourable to the employee by ignoring factors which are quite relevant and material to the foundation of public administration ? Should the courts sit in appeal over the order of decision of the appropriate authority ? Answers to all such questions are in negative and the jurisdiction and scope of judicial review is very limited. When the court is satisfied that the exercise of power under this rule amounts to colourable exercise of power or is arbitrary or mala fide it can always strike down the order. However, as observed by Justice V. H. Krishna Iyer in case of BALDEVRAJ CHADHA V. UNION OF INDIA, AIR 1981 SC 70 (Supra) "Judicial monitoring becomes an unpleasant necessity where power may be humor and a career may be a victim. Potential compulsory retirement under Rule 161 haunting the afternoon of official life injects an awesome uncertainty which makes even the honest afraid, the efficient tremble and almost everyone genuflect". Since exercise of such power has very drastic consequences on the Government servants in the evening of his career and since the scope

of of judicial review is stated to be very limited it becomes the duty of the court to sedulously check exercise of such power. The adverse affect of the order on the Government employee cannot be better stated than in the words of justice Krishna Iyer in the case of Baldevraj Chadha Vs. Union of India (Supra). Justice Krishna Iyer observed as under :-

"The administration, to be competent, must have servants who are not plagued by uncertainty about tomorrow. At the age of 50 when you have family responsibilities and the sombre problems of one's own life's evening, your experience, accomplishments, and fullness of fitness become an asset to the administration, if and only if you are not harried or worried by "what will happen to me and my family ? Where will I go if I cashiered ? How will I survive when I am too old to be newly employed and too young to be superannuated ? These considerations become all the more important in Department where functional independence, fearless security, and freedom to expose evil or error in high places in the task. And the ombudsmanic tasks of the office of aduit vested in the C & AC and the entire army of monitors an minions under him are too strange for the nations financial health and discipline that immunity from subtle threats and oblique overawing is very mush in public interest" if unlimited discretion is regarded acceptable for making an order of premature retirement, it will be the surest menace to public interest and must fail for unreasonableness, arbitrariness and disguised dismissal. To constitutionalise the rule, we must so read it as to free it from the potential for the mischiers we have just projected. The exercise of power must be bona fide and promote public interest. There is no emostrable ground to inter mala fides here and the only infirmity alleged which deserves serious notice is as to whether the order has been made in public interest. When an order is challenged and its validity depends on its being supported by public interest the State must disclose the material so that the court may be satisfied that The order is not bad for want of any material whatever which to a reasonable man reasonably instructed in the law, is sufficient to sustain the grounds of "public interest" justifying forced retirement of public servant. Judges cannot substitute their judgment for that of the

> Administrator but they are not absolved from the minimal review well settled in administrative law and founded on constitutional obligations. The limitations on judicial power on this area are well known and we are confined to an examination of the material merely to see whether a rational mind may conceivably be satisfied that the compulsory retirement of Th. officer concerned is necessary."

It becomes clear from the above observations that under the guise of "public interest" if unlimited discretion is regarded acceptable from making the order of premature retirement it will be the surest menace to public interest and it must fail for unreasonableness, arbitrariness and disguised dismissal. Shortly speaking, in order to succeed in an action challenging the order of premature retirement the authority exercising power must prove that the exercise of power is bonafide and is to promote public interest. The authority must disclose the material based on which the order is passed, and the court must be satisfied that the order is not bad for want of any material whatever, which to a reasonable man reasonably instructed in the law, is sufficient to sustain the ground of "public interest". However, the Court cannot substitute its judgment for that of the authority but the courts are not absolved from the minimal review well settled in administrative law and founded on constitutional obligations."

##. In view of the foregoing discussion, I am of the opinion that the impugned order is not sustainable in the eye of law, more particularly in view of the catena of judgments of the Apex Court referred to hereinabove and, therefore, the impugned order is vitiated and is liable to be quashed and set aside.

##. Mr. Oza, learned advocate for the petitioner, has contended that had the petitioner not been made prematurely retired from service, he would have retired in due course on completing 58 years and hence there is no question of granting the relief of reinstatement in favour of the petitioner. As discussed earlier, since the challenge to the vires of section 161 (1) (aa) of the BCSRs has not been pressed by the petitioner, that aspect of the matter is not required to be gone into.

##. In the net result, the petition succeeds partly and accordingly it is partly allowed. The order dated 8th August, 1986 prematurely retiring the petitioner from

service is quashed and set aside. The respondents are directed to treat the petitioner as if he was in continuous service till the date on which he would have actually superannuated on his attaining the age of 58 years had the impugned order of compulsory retirement dated 8th August, 1986 not been passed. The petitioner shall be entitled to all monetary benefits as if the impugned order had never been passed. The arrears of salary and other retirement benefits will be determined by the respondents as if the petitioner had continued in service till the date on which he would have retired on attaining the age of superannuation had there been no order retiring the petitioner prematurely. The petitioner shall be paid the arrears of pay and allowances and pensionary benefits as if he has retired from the service in due course on his attaining the age of 58 years, within three months from the date of receipt of the writ of this Court. Rule is accordingly made absolute to the aforesaid extent. There shall be no order as to costs.

Date : 25.8.2000 [H.K.Rathod, J.]

#Vyas#